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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 468

EMMETT COCHRAN, ET AL.,
Appellants,

vs.

LOUISIANA STATE BOARD OF EDUCATION, ET AL.,
Appellees.

STATEMENT IN SUPPORT OF JURISDICTION

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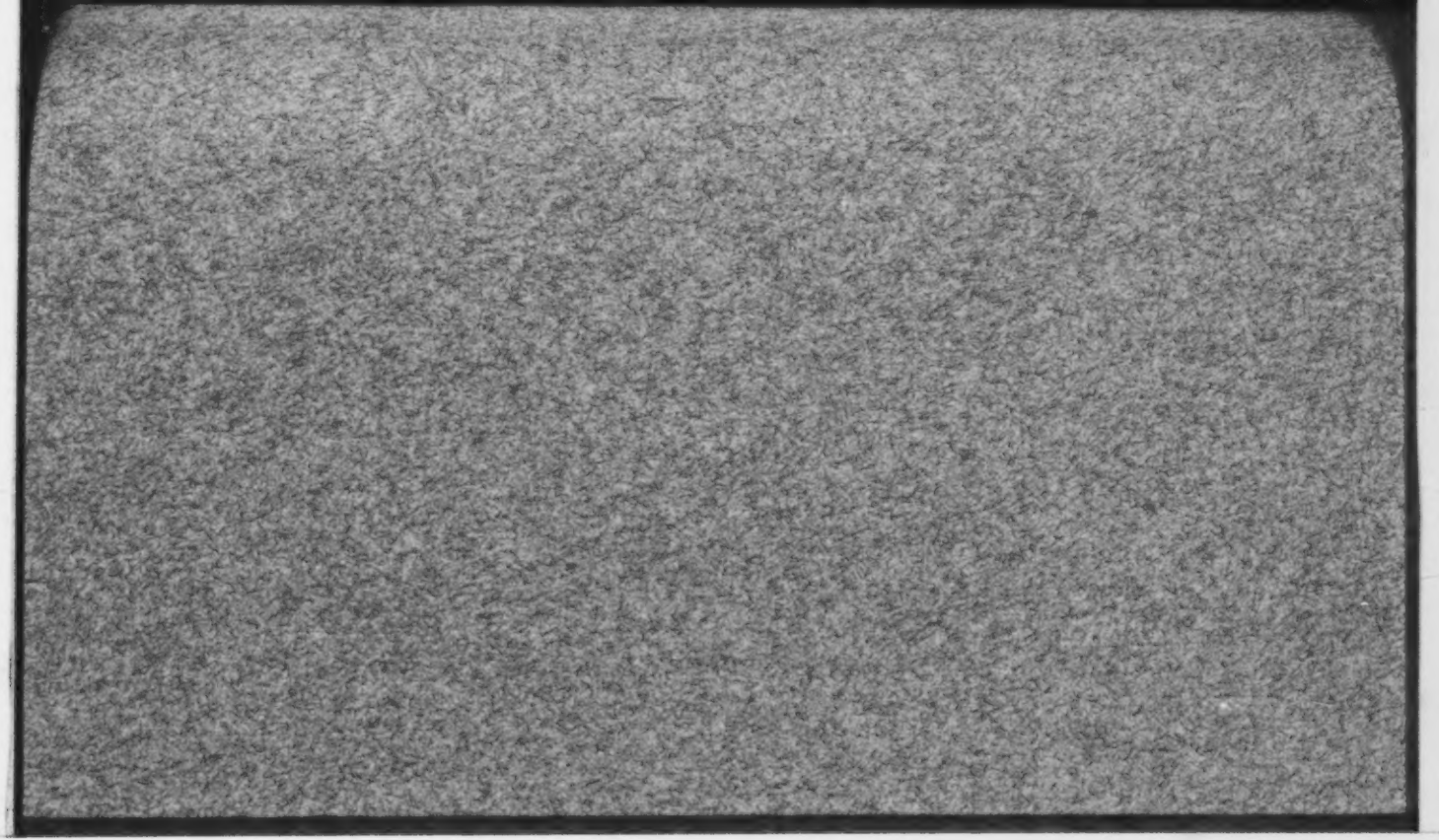

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STATEMENT IN SUPPORT OF JURISDICTION

I.

The jurisdiction of this Court rests on Section 237 of the Judicial Code, as amended by the Act of February 13, 1920.

The appellant relies on the 14th Amendment to the Constitution of the United States as a basis for the jurisdiction of this Court; also, on Section 4, Article 4, thereof.

II.

The date of the decision of the Supreme Court of Louisiana to be reviewed is June 17, 1929 (Typ. R., p. 36 et seq. *All references to Record herein are to typewritten Record*).

Petition for rehearing was denied July 8, 1929 (R., p. 55).

The application for allowance of appeal was presented to the Chief Justice of the Supreme Court of Louisiana on October 2, 1929, and was duly allowed on that date, citation returnable in thirty days. The application and allowance were, therefore, timely, and the final date for filing this appeal in this Court was November 1, 1929, before which date said appeal was perfected.

III.

The decision, above referred to, upheld the Constitutionality of the Acts of the Legislature of the State of Louisiana (hereinafter quoted), which acts had been duly attacked in the pleadings, as being an infringement of Section 4, Article 4, of the Constitution of the United States, and of plaintiff's rights under the due process clause of the 14th Amendment to the Constitution of the United States.

The statutes in question are as follows:

Act No. 143 of the General Assembly of the State of Louisiana; for the year 1928:

"ACT No. 143.

GENERAL APPROPRIATION ACT.

HOUSE BILL No. 51.

AN ACT

MAKING AN APPROPRIATION TO DEFRAY THE ORDINARY EXPENSE OF THE GOVERNMENT; TO PAY THE INTEREST ON THE PUBLIC DEBT; AND TO SUPPORT PUBLIC SCHOOLS AND PUBLIC CHARITIES IN THE STATE OF LOUISIANA; TO BUILD AND REPAIR PUBLIC LEVEES; TO MAINTAIN THE STATE PENITENTIARY; AND OTHER STATE DEPARTMENTS FOR THE YEAR COMMENCING JULY 1, 1928, AND ENDING JUNE 30TH, 1929, AND FOR THE YEAR COMMENCING JULY 1ST, 1929, AND ENDING JUNE 30TH, 1930.

* * * * * *

OUT OF THE SEVERANCE TAX FUND.

For purchase of free school books for the use of School children of this State, to be expended by the State Board of Education of Louisiana as provided by House Bill No. 90 of 1928, or so much thereof as may be necessary..... $750,000.00

(After the above appropriations have been paid or provided for, then the balance from said Severance Tax Fund to be transferred to the current school fund as provided by House Bill No. 90 of 1928").

Act No. 100 of the General Assembly of the State of Louisiana for the year 1928:—

"ACT No. 100.

BOOKS FOR SCHOOL CHILDREN TO BE PAID OUT OF SEVERANCE TAX FUND.

HOUSE BILL No. 90.

AN ACT

PROVIDING FOR THE DISTRIBUTION OF THE SEVERANCE TAX FUND; FIRST, FOR THE PURCHASE OF SCHOOL BOOKS FOR SCHOOL CHILDREN AND THE BALANCE THEREAFTER TO THE PUBLIC SCHOOL FUNDS OF THE STATE OF LOUISIANA.

SECTION 1. Be it enacted by the Legislature of Louisiana, That the Severance Tax Fund of the State, as levied by Act 46 of 1922, as amended, shall be devoted after allowing funds and appropriations as provided by the Constitution of the State, first, to supplying school books to the school children of the State of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the State public school funds.

SECTION 2. That the State Board of Education of Louisiana, shall provide the said school books for school children free of cost to such children of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the State public school funds.

SECTION 3. That this Act shall not apply to persons attending colleges and universities.

APPROVED By Governor:
July 11, 1928."

The Supreme Court of Louisiana interpreted these acts as requiring the expenditure of State funds for the purpose of supplying school books free to children attending both public and private schools (R., p .43).

The plaintiffs below contended that the purchase of text books from public funds, raised by general taxation to be furnished free to all school children, including those attending private schools where tuition is charged (R., p. 3, par. 9) results in irreparable injury to them (R., p. 4, par. 12; R., p. 5, par. 13) and constitutes taking of private property without due process of law (because it constitutes a taking for a private and not a public purpose) in violation of the 14th Amendment to the Constitution of the United States (R., p. 8, par. 16-g) and is contrary to the republican form of Government guaranteed by Section 4 of Article 4 of the Constitution of the United States (R., p. 8, par. 16-g).

In addition, it was urged that these Statutes violated the express provisions of the State Constitution, notably:

Section 12 of Article 4.

> "The funds, credit, property or things of value of the State, or of any political Corporation thereof shall not be loaned, pledged or guaranteed to or for any person or persons, associations, or corporations, public or private."

Section 13 of Article 12.

> "No public funds shall be used for the support of any private or sectarian school",

as well as the several other Articles particularly enumerated in the pleadings.

The Supreme Court of Louisiana held that the expenditure of State funds for the above purpose was an ordinary obligation and expense of government (R., p. 41); was a lawful exercise of the police power of the State (R., p. 43); that the said Acts do not violate the due process clause of the 14th Amendment to the Constitution of the United States, (R. pp. 44 and 45) nor Section 4, Article 4 of the Constitution of the United States (R., p. 45). Thereupon that Court affirmed the decision denying the injunction prayed for.

Thus, there is presented a suit wherein is drawn in question the validity of a Statute of the State of Louisiana on the ground of its being repugnant to the Constitution of the United States in which the decision of the Supreme Court of that State was in favor of the validity of the Statute. (Judicial Code, Section 237).

WHEREFORE, it is submitted that this Court has jurisdiction to review the decision appealed from.

IV.

POINTS AND AUTHORITIES

1.

Appeal is the remedy for review of the decision of a state court of last resort, where a state law is alleged to infringe the Federal Constitution.

Western Turf Ass'n. vs. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. ed. 520, holding that (syllabus)

"The judgment of the highest court of a State

sustaining as a legitimate exertion of the police power of the State, a statute, the validity of which was challenged as repugnant to the Federal Constitution, is reviewable in the Federal Supreme Court by a writ of error."

Great Northern Ry. Co. vs. State of Minnesota, 49 Sup. Ct. 191, 73 L. ed. —, U. S. Sup. Ct. Adv. Opinions March 1, 1929, page 241.

2.

The validity of a statute which can only be fulfilled by resort to taxation depends on the power of the state to levy the tax for the purpose for which the tax fund is to be used.

Parkersburg v. Brown, 106 U. S. 487, 501;

> "Taxation to pay the bonds in question (bonds were issued by City to finance a private enterprise) is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

Cole v. LaGrange, 113 U. S. 1, 6.

> "The general grant of legislative power in the Constitution of a State (Missouri) does not enable the Legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent for any but a public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

3.

The action of a state in levying taxes for a private, as distinguished from a public purpose, raises a constitutional question under the 14th Amendment to the Constitution of the United States.

Fall Brook Irrigation District v. Bradley, 164 U. S. 112, 158:

> "In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government."

4.

That statutes authorizing the aid of private schools by taxation levy taxes for a private, as distinguished from a public purpose, is a principle established and approved by the decisions of this Court.

Savings and Loan Asso. v. Topeka, 20 Wall. 655:

> "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

"It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for puroses of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufactures, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two thirds of the business men of the city or town. * * * In the case of *Lowell* v. *Boston*, in the Supreme Judicial Court of Massachusetts, the validity of this Act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regu-

lar series of that court. (111 Mass., 454.) The American Law Review for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

"The same court had previously decided, in the case of *Jenkins* v. *Anderson* (Andover), 103 Mass. 94, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

"The same principle precisely was decided in the case of *Curtis* v. *Whipple*, 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting* v. *Fond du Lac*, already cited, the principle is fully considered and re-affirmed.

"The cases are clearly in point, and *they assert a principle which meets our cordial approval.*" (Italics ours.)

The principles decided in that case have never been denied in this Court, but on the contrary they have frequently been cited with approval. *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; *Fall Brook Irrigation District* v. *Bradley*, 164 U. S. 112; *Green* v. *Frazier*, 253 U. S. 233.

5.

The giving of free text books by the state to school children attending private schools which charge tuition and require the children to furnish their school books,

is essentially, and as a practical matter, an aid to such private institutions by furnishing a part of the equipment of such private schools; if not directly, it is certainly indirectly. If the legislature may not levy a tax for the aid of private schools it may not indirectly do the same thing.

In *Underwood* v. *Wood*, 93 Ky. 177, 15 L. R. A. 825, Judge Pryor said:

> "The Act incorporating the academy in substance provides that Robinson may contract with the parents of children residing within the common school district for teaching their children, and the parent or parents making such contracts, paying doubtless a higher price than the amount of the ordinary school tax, are exempt from the burden of maintaining, furnishing, or repairing any schoolhouse for and during the school years their children may be sent to the Taylor Academy. There are not less than 350 children within the common school district (two of the districts having been consolidated), and out of this number, by the provisions of the Act, Robinson can select such as he may desire to attend his school, by making a contract with their parents; and, having done so, these children attending the academy get their part of the common school fund, to be paid to the teachers of the college, and in this manner diverting the fund from the common school to the payment of teachers in an individual enterprise, and relieving its patrons who live within the district from the burden of taxation imposed for building and keeping in repair the school buildings erected for common school purposes. * * *
>
> "If a case could exist where such legislative action would be sanctioned, it is found in the case before us; but, when ample remedies are afforded by the law regulating common schools to prevent such results as is now attempted to justify this character of legislation, there is no reason for

establishing a precedent that must, if followed, destroy the very existence of common schools. This court has held in several cases that when graded schools have teachers under the control of the common school trustees, and where all children have the benefit of the school within the district, that the fund may be appropriated to the payment of the teachers. In this case the trustees have no voice in the selection of the teachers, nor can any child go to the academy as a pupil without paying tuition, *and in fact the legislative Act has applied the school fund to be used by a private institution.*" (Italics ours.)

Smith v. *Donahue,* 195 N. Y. S. 715, 202 App. Div. 656, 661.

(Action brought to restrain defendants, Board of Education, from procuring with public funds and delivering free text-books and ordinary school supplies for the use of pupils of schools other than the public schools of the district):

"These books have been procured by the board of education and delivered to the school; but the defendants say that books and supplies while so procured and furnished, are furnished under the above section of the Education Law (Sec. 864, subd. 4) to the children attending the schools and not to the schools. Even though we accept the statute as meaning that the books and supplies are to be furnished to the pupils and not the schools, we think the act plainly comes within the prohibition of the Constitution; if not directly in aid of the parochial schools, it is certainly in indirect aid. The scholars do not use text-books and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there. There is no question but that the text-books and ordinary supplies are furnished direct to the public schools; there is no thought that they are furnished to the scholars as

distinct from the schools; neither can there be such a thought in the case of the parochial schools."

6.

In the case of taxation, the test to be applied, as respects the purpose or use, is the same as that applied when property is sought to be taken by right of eminent domain. Applying this test, it is uniformly held that property may not be taken by eminent domain for a use in which the public has not a common and equal right to the use and benefit and that private schools, not under public control, come within this category.

In *Cole* v. *LaGrange*, 113 U. S. 1, 8, it is said:

> "But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. It is a taking by the State for a public use, and not to promote private ends."

The leading case on the subject is *Connecticut College* v. *Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, which rests on *Jenkins* v. *Andover*, 103 Mass. 94, and *Curtis* v. *Whipple*, 24 Wis. 350—the two cases expressly approved by this Court in *Loan Asso.* v. *Topeka, supra.* In *Conn. College* v. *Calvert*, it is said:

> "Neither the industry of counsel nor our own research has discovered any case (subject to the exception already noted) in which the courts have sustained as constitutional a grant of the right of eminent domain in favor of a private corporation administering a purpose governmental in its nature, whether educational, charitable, or otherwise, except when there was secured to the public a common and equal right to the use or benefit of the property taken. * * *

"It is a matter of common knowledge that there are many colleges for the higher education in which the public have not, and cannot acquire, the right to be educated.

"We find no authority in the decided cases for the position that colleges stand in any different relation to the state from other public charities, and we are unable to see why any distinction can be drawn which would justify the delegation of the power of eminent domain to colleges, while denying it to private hospitals, orphan asylums, or cemeteries."

If the furnishing of school books to children attending private schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purose is equally obnoxious to the federal constitution because it constitutes a diversion of public property to private individuals without distinction as to need for charity and without any special obligation of the state, charitable or otherwise, to such persons.

Savings and Loan Asso. v. Topeka, 20 Wall. 655:

"To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

The same principle has been held in state cases, and applied to aid to those attending private schools.

State v. Switzler, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280:

"The same authority is found in the Constitu-

tion to levy taxes to clothe and feed the children who may desire to attend the free public schools, as there is to raise money by taxation to hand over to young men and young women to support them while they acquire what is termed 'the higher or university education;' but we find no warrant for either in the organic law of this state or in the character of our government. * * *

"The act under consideration endows the scholar, not the university. * * * It is a pure and simple gift of public money by the state to private individuals, for their own private use. * * *

"It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers, in the meaning of the law. Even without this admission, it is perfectly apparent that the act, by its terms, does not confine this pension to the children of poor persons who may, in a legal sense, be denominated 'paupers.'"

8.

The distinction between this case and those affirming the constitutional authority of the state to aid railroads or to engage in private enterprises serving the public (Green v. Frazier, 253 U. S. 233), *is that in the latter cases there is secured to the public both public control and common and equal right of use. Loan Asso. v. Topeka,* 20 Wall. 487; *Green v. Frazier, supra; Connecticut College v. Calvert,* 87 Conn. 421.

In the case of private schools, whether sectarian or not and whether run for profit or not, there is lacking this element of public control and common and equal right of the public to use. As regards the constitutional question, therefore, private schools stand on precisely the same footing as a privately owned manu-

facturing industry or any other private enterprise, and they have been so considered by this court in the cases cited.

Respectfully submitted,

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